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In The
Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1942

RICHARD ERZNOZNIK, as Manager of the
University Drive-In Theatre,
Appellant,

v.

CITY OF JACKSONVILLE

**APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA**

BRIEF FOR THE APPELLANT

OPINIONS BELOW

1. The Final Judgment entered by the Circuit Court of Duval County, Florida, dated January 30, 1973, is not reported but is printed in the Appendix, pages A. 75 - A. 79.

2. The Opinion and Order of the District Court of Appeal, First District of Florida,[1] No. S-452, affirming said Final Judg-

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1. Herein referred to as "First District."

ment is reported at 288 So.2d 260, and printed in the Appendix, page A. 81.

3. The Order entered by the Supreme Court of Florida denying Petition for Writ of Certiorari to the District Court of Appeal is reported at 294 So.2d 93 and printed in the Appendix, page A. 82.

JURISDICTION

Jurisdiction is conferred by 28 U.S.C. 1257 (2).

The time factors upon which jurisdiction rests are:

1. The Final Judgment of the Circuit Court was entered January 30, 1973 and Notice of Appeal timely filed February 9, 1973 (A. 1).

2. The First District's Opinion was filed January 8, 1974, Petition for Re-Hearing was timely filed, and re-hearing denied February 5, 1974 (A. 3).

3. Petition for a Writ of Certiorari to the First District was timely filed in the Supreme Court of Florida February 13, 1974 and denied April 25, 1974 (A. 3).

4. Notice of Appeal to the United States Supreme Court was timely filed in the First District June 13, 1974 (A. 3).

ORDINANCE INVOLVED

The ordinance involved was enacted January 14, 1972 – designated as Section 330.313, Chapter 71-552-519 of the Ordinance Code of the City of Jacksonville, Florida – and reads:

> "BE IT ORDAINED by the Council of the City of Jacksonville:

Section 1. The Ordinance Code of the City of Jacksonville is amended by adding the following Section 330.313:

330.313. *Drive-In Theatres, Films Visible from Public Streets or Public Places.* It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theatre in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human male or female bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense. USDs 2-5 Excepted." Chapter 71-552-519. (Def. Exh. No. 1: A. 13)

QUESTION PRESENTED FOR REVIEW

Whether the First Amendment tolerates a City Ordinance which criminalizes, as a public nuisance per se, exhibition of "any motion picture" at a drive-in theatre having scenes in which the "human male or female bare buttocks, human female bare breasts, or human male or female bare pubic areas are shown . . . visible from any public street or public place?"

STATEMENT OF THE CASE

Declaratory Judgment Action Complaint:

Erznoznik (herein called "Erznoznik") brought a Declara-

tory Judgment action by a Complaint alleging, in material part:

"6. Accordingly, the instant action has been brought and Erznoznik asserts and challenges that The Ordinance is unconstitutional and invalid in that it:

"a. Purports to make unlawful the exhibition of a non-obscene motion picture at a drive-in theatre which may not be made unlawful when exhibited at an indoor theatre because of the protection afforded by the First Amendment of the Constitution of the United States:

"b. Purports to make criminal and authorize the suppression of a motion picture protected by the First Amendment of the Constitution of the United States on the pretense that such an exhibition constitutes a public nuisance;

"c. Purports to denounce as a public nuisance – not within the protection of the First Amendment of the Constitution of the United States – the exhibition of a motion picture merely containing scenes showing 'the human male or female bare buttocks, human female bare breasts, or human male or female bare pubic areas,' notwithstanding that such scenes, as a matter of law, cannot be demonstrated to be 'manifestly injurious to the morals or manners of the people' of The City, thus The Ordinance exceeds the constitutional and statutory powers of The City to define and suppress public nuisances;

"d. Purports to declare criminal and a public nuisance an act that is not criminal nor a nuisance in fact;

"e. Purports to make criminal -- as a public nuisance

-- the exhibition of a motion picture at a drive-in theatre containing scenes of 'the human male or female bare buttocks, the human female bare breasts, or the human male or female bare pubic areas,' notwithstanding that it cannot be demonstrated that such scenes tend to corrupt the public morals or manners of the people of The City and therefore the classification is arbitrary and unreasonable as a matter of law;

"f. Purports to impose strict or absolute criminal liability upon the showing of motion pictures at drive-in theatres containing scenes as described in the preceding subparagraph, notwithstanding that the First Amendment to the Constitution of the United States mandates that scienter be proven to support a prosecution intended to suppress such a motion picture;

"g. Purports to make criminal the exhibition of a motion picture -- as described in the preceding subparagraph -- visible from a public place or public street, without definition thereof -- and thus is unconstitutionally vague for failure to give fair notice as to the conduct proscribed." (A. 8)

Final Judgment:

The trial court found that "The evidence . . . showed the screen is easily seen and the pictures are actually viewed by the public from the public streets . . . and the *Court takes notice of the fact children as well as adults make up the public*" – and concluded:

"2. The ordinance in question is constitutional in that it does not violate any protection granted to the plaintiff by the provisions of the Constitution of the United States of America or the State of Florida. (A. 77)

* * *

"4. A municipality's right to declare and abate public nuisances is well grounded in the law. A legislative finding by the City that a certain matter is a public nuisance is entitled to great deference by the Courts and the plaintiff herein has the burden in demonstrating its invalidity. Plaintiff has not carried that burden.

"5. The Court concludes that plaintiff has not demonstrated that the classification established by the ordinance is arbitrary or unreasonable. Indeed, it is apparent that the ordinance is reasonably related to a legitimate legislative purpose and that this court should not substitute its judgment for the legislative body which enacted it.

"6. The ordinance is not an obscenity law and it would be error to judge such law by established legal standards of obscenity. However, the Supreme Court has recognized, even in *obscenity* prosecutions, that there are special considerations which are applicable when concern for juveniles is involved. Redrup v. New York 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967). (A. 78)

* * *

"8. As stated in *Chemline, Inc. v. City of Grand Prairie* 364 F.2d 721 (5th Cir., 1966):

'It is almost self-evident that a city is well within its legitimate police powers in enacting reasonable ordinances to protect children in its public streets and highways from viewing 'bare buttocks' or 'bare female breasts' or 'striptease, burlesque or nudist-

type scenes which constitute the main or primary material.' (A. 79)

"Wherefore, it is

"ORDERED AND ADJUDGED that:

"The Court having found the Ordinance 71-552-519 of the City of Jacksonville to be constitutional and a valid exercise of the police power of said city, the plaintiff's prayer for a declaration by this court that said ordinance is unconstitutional is denied." (A. 79)

First District Affirms:

The First District affirmed Per Curiam, citing *Chemline, Inc. v. City of Grand Prairie,* supra, as controlling:

"PER CURIAM.

"Affirmed. See Chemline, Inc. v. City of Grand Prairie 364 F.2d 721 (5th Cir., 1966).[2]

"RAWLS, C. J., and SPECTOR and JOHNSON, J.J., concur." (A. 81)

Supreme Court of Florida Denies Certiorari:

With three judges dissenting, the Supreme Court of Florida denied Certiorari thus leaving the First District opinion the judgment of ". . . the highest court of a state in which a

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2. The trial judge did not have the benefit of the Seventh Circuit's opinion in *Cinecom Theatres Midwest St., Inc. v. City of Fort Wayne,* 473 F.2d 1297 (7th Cir., 1973), which was handed down January 29, 1973, just one day before the Final Judgment of the trial judge was filed. However, both the First District and the Supreme Court of Florida did have that case before them and chose to follow *Chemline.*

decision could be had. . ." as required by 28 U.S.C. 1257 (2) to sustain jurisdiction here.

ARGUMENT

Factual Summary:

On March 22, 1972, Appellant was served with a Summons (A. 12) requiring his appearance in the Municipal Court of the City of Jacksonville, Florida, on April 6, 1972, to face charges that he ". . . as Manager of the University Drive-In Theatre . . . on the 29th day of January, A.D., 1972, . . . did knowingly exhibit a motion picture in which the human female buttocks and bare breasts were shown, and said scenes were visible from a public street and a public place, to-wit: Resurrection Catholic Church, located on Jack Road, Jacksonville, Duval County, Florida . . . contrary to Chapter 71-552-519 of the Ordinance Code of the City of Jacksonville . . ." (A. 11).

Erznoznik appeared as required for arraignment and by stipulation the prosecuting attorney, with consent of the presiding judge, agreed that the Criminal prosecution should be held in abeyance pending commencement of a proceeding in the Circuit Court of Duval County for a Declaratory Judgment on the constitutionality of the subject Ordinance. [See Paragraphs 3, 4, and 5 of the Complaint (A. 6) the allegations of which are admitted by Appellee's Amendment of Answer (A. 1).]

A proceeding for a Declaratory Judgment was duly commenced and prosecution of Erznoznik is still "held in abeyance" pending "final disposition" thereof which said matter is now before this Court on Erznoznik's appeal from adverse

rulings of the Circuit Court of Duval County (A. 75), the District Court of Appeal - First District of Florida (A. 81) and the denial of Certiorari by the Supreme Court of Florida (A. 82).

Although a "trial" was held (A. 14-74) in the Circuit Court, there was no dispute as to any material fact and the material facts are not now in dispute. The sole question presented to and determined by the trial judge in the Declaratory Judgment action was "whether what they (the City Council) did meets constitutional standards" (A. 71).

"What they did" was to enact the subject Ordinance, the challenged portion of which reads:

> - - - - - It shall be unlawful *and it is hereby declared a public nuisance* for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theatre in the City *to exhibit*, or aid or assist in exhibiting, *any motion picture*, slide, or other exhibit in which the *human male or female bare buttocks, human female bare breasts, or human male or female bare pubic areas are shown, if such motion picture*, slide, or other exhibit *is visible from any public street or public place*. Violation of this section shall be punishable as a Class C offense." (Underscoring added)

In upholding the subject Ordinance, the trial judge held said Ordinance ". . . to be constitutional and a valid exercise of the police power of said City . . ." and that ". . . the Plaintiff's prayer for a Declaration by this Court that said Ordinance is unconstitutional is denied." (A. 79)

Erznoznik appealed, contending that the trial court erred

in finding said Ordinance constitutional and in failing to find and declare said Ordinance unconstitutional (A. 80).

The First District affirmed the ruling of the trial judge in two sentences, to-wit:

> "Affirmed. See *Chemline, Inc. v. City of Grand Prairie*, 364 F.2d 721 (5th Cir., 1966)." (A. 81)

On Petition for Writ of Certiorari, directed to the First District Court of Appeal, the Supreme Court (divided 4 to 3) denied review (A. 82).

It is undisputed that on January 29, 1972, Erznoznik was the manager of the University Drive-In Theater (A. 16); that on that date a *non-obscene*[3] motion picture, "Class of '74", was displayed at the University Drive-In Theatre and also at two indoor theatres operated by the same corporation (A. 18); that the screen was and is visible from a public street and public place . . . Jack Road and the parking lot of the Resurrection Catholic Church . . .; (A. 43-61); that said screen can likewise be seen from one or more private residences (A. 68-69); and, that said screen is "visible and is viewed from public places in and around the outside of the theater fence." (A. 57 and 65)

Summary of Argument:

Public nuisance device is not an appropriate method by which to separate speech unconditionally guaranteed from that which may be regulated, suppressed or punished.

Non-obscene movies may not be suppressed by an Ordi-

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3. At the trial counsel for the City, Mr. Nimmons, said, among other things, "Now, we are not dealing with the question of obscenity. We cannot be drawn and should not be drawn into having to prove any of the legal definitions of obscenity . . ." A. 26). "Class of '74" was rated "R" by the Motion Picture Association of America, at the time it was shown.

nance which prohibits even fleeting glimpses of certain bare anatomical areas, regardless of context, simply because the outdoor screen is visible from a public street or place.

Redrup v. New York, 386 U.S. 767, does not save the Jacksonville Ordinance because *Redrup* expressed a specific concern for juveniles, a concern for whom Jacksonville's Ordinance makes no reference.

The Fifth Circuit's 1966 *Chemline* opinion (364 F.2d 721) is out of date, dealt with movies in which nudism and sexuality were the main or primary material and has been eroded by subsequent decisions including one authored by Judge Rives who authored *Chemline*.

Furthermore, the Seventh Circuit's 1973 Cinecom opinion (473 F.2d 1297) *rejects Chemline* on sound authority, reason and principle and outlaws an Ordinance enacted by the City of Fort Wayne which made it unlawful for drive-in theatres to exhibit films in which "bare buttocks or bare female breasts are shown" visible from any public street or highway.

Courts are not foreclosed from inquiring into legislative findings of nuisances where no nuisance in fact exists and the mere public-viewing of bare buttocks, breasts and/or pubic areas in a non-obscene movie on a drive-in movie screen is neither "manifestly injurious to the manners and morals" of the community nor a nuisance in fact.

Neither can it be said that the nude, non-obscene, views justify the exercise of police power to protect intrusion upon privacy under *Cohen v. California*, 403 U.S. 15.

Finally, apart from authority, the Ordinance cannot pass constitutional muster because it criminalizes mere nudity, it

criminalizes showings seen from a public place but not from a private place, it criminalizes every employee of the theatre regardless of role or knowledge, it is not directed to the protection of children or the motoring public, the acts criminalized have no relevant effect on the manners or morals of the community and the complex web of freedoms that make up free speech are simply too precious to be tampered with using such a "shot-gun" approach -- "throwing the baby out with the bath," as the saying goes.

Public Nuisance Device and First Amendment:

A first principle of First Amendment law is that "the complex web of freedoms which make up free speech" requires that "the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment . . ." More precisely, "the line between speech unconditionally guaranteed and speech which may . . . be regulated, suppressed or punished is finely drawn" -- and, accordingly, the "separation of legitimate from illegitimate speech calls for . . . sensitive tools . . .". *Speiser v. Randall*, 357 U.S. 513; 2 L.Ed. 2d 1460; 78 S.Ct. 1332; see, also, *Thomas v. Collins*, 323 U.S. 516; 89 L.Ed. 430; 65 S.Ct. 315 (1944).

A review of the cases in point, from both federal and state jurisdictions, demonstrates public nuisance is not such a "sensitive tool" -- but, on the contrary, a blunderbuss -- unacceptable, inherently, to the First Amendment -- when sought to be employed to define and punish speech.[4]

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4. For example, in *Grove Press v. City of Philadelphia*, 300 F.Supp. 281 (E.D.Pa., 1969), aff'd 418 F.2d 82 (1969), the "common law ground . . . (of) public nuisance" -- as a vehicle for "suppression of expression" -- was denounced as "necessarily prohibited by the First and Fourteenth Amendments."

Florida's First District, too, has disapproved public nuisance as a mechanism to flank the First Amendment fortress -- and "get at"

(Continued on next page)

Even the pre-activist United States Supreme Court made short shrift of a Minnesota statute proscribing, as a public nuisance, publication of an "obscene, lewd and lascivious newspaper, magazine or other periodical . . .". *Near v. Minnesota*, 283 U.S. 697; 75 L.Ed. 1357; 51 S.Ct. 625 (1931).

The Near pronouncement was not an exercise in the baffling "judicial needlepoint" typical of the "balancing test" fashioned by this court to weigh the compelling interests of the state against the value of specific Bill of Rights guarantees, as a means of sounding the constitutionality of legislative acts. *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969); *American Communications Association v. Douds*, 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 674 (1949); *Weimon v. Updegraff*, 344 U.S. 183, 97 L.Ed. 216, 73 S.Ct. 215 (1952).

Rather, *Near* was a crystalline statement that public nuisance is an outlaw, anti-First Amendment advice, because inconsistent, by the nature of things, with "the conception of . . . liberty . . . as historically conceived and guaranteed."

(Continued from Page 12)

assertedly obscene speech. *Mitchem v. Schaub*, 250 So.2d 883 (1971).

And California, Missouri and North Carolina courts have stricken down ordinances -- much like Jacksonville's -- aimed, expressly, at drive-in theatre operations. *Burton v. Municipal Court of Los Angeles*, 441 P.2d 281 (1968); *Olympic Drive-In Inc. v. City of Pagedale*, 441 S.W.2d 5 (Mo., 1969); *State v. Furio*, 148 S.E.2d 275 (1966).

See also: *Vista Theatre Corporation* v. *City of Fort Worth*, 322 F.Supp. 1147 (N.D.Tex. 1971).

This case involved, but did not pass on the constitutionality of, an ordinance which read as follows: "It shall be unlawful for the owner, manager, operator, assistant manager, assistant operator, ticket seller, ticket taker, usher and/or any other person connected with or employed by any motion picture theatre or drive-in motion picture theater in the City of Fort Worth or to aid or assist in such showing or exhibition of any motion picture, film, slide or other exhibit which is visible from any public street or highway in which the pubic area, bare buttocks or bare female breasts of the human body are shown."

Jacksonville Ordinance Throw-Back to Common Law Repudiated in Roth:

Jacksonville's ordinance outlaws, as public nuisances, drive-in movies containing even fleeting glimpses of certain bare anatomical areas -- notwithstanding that their "dominant theme" is innocent.

Thus, it is a throwback to the common law doctrine which "allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons" -- a doctrine expressly repudiated in *Roth v. United States*, 354 U.S. 476; 1 L.Ed.2d 1498; 77 S.Ct. 1304 (1957).

Here, the trial judge erroneously applied that principle in a non-obscenity case on the assumption that the Ordinance in controversy is a constitutionally acceptable prophylactic measure (where mere nudity is displayed) against the corruption of children:

> "6. The ordinance is not an obscenity law and it would be error to judge such law by established legal standards of obscenity. However, the Supreme Court has recognized, even in *obscenity* prosecutions, that there are special considerations which are applicable when concern for juveniles is involved. *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967). (A. 78)
>
> * * * * *
>
> "8. As stated in *Chemline, Inc. v. City of Grand Prairie*, 364 F.2d 721 (5th Cir., 1966):
>
> 'It is almost self-evident that a city is well within its legitimate police powers in enacting reasonable ordinances to protect children in its public streets and highways from viewing 'bare buttocks' or 'bare fe-

male breasts' or 'striptease, burlesque or nudist-type scenes which constitute the main or primary material.'" (A. 79)

Redrup Case:

Jacksonville's Ordinance nowhere reflects "a specific and limited state concern for juveniles" -- which means, *Redrup* is not authority for -- but against -- the Ordinance's constitutionality -- inasmuch as, in *Redrup, inter alia*, the convictions of three accused pornographers were upset for want of "a claim that the statute in question reflected a specific and limited state concern for juveniles."

Chemline Case:

Chemline is an antique statement of First Amendment law vis-a-vis the State's power to enact legislation to insulate juveniles from exposure to obscene materials.

In that case, the District Court declared the Grand Prairie, Texas, ordinance[5] -- tested in *Chemline* -- irreconcilable with the First Amendment -- and void-- since there was no showing of harm to the average person.

The Fifth Circuit reversed with Judge Rives' opinion reasoning it was to him "almost self-evident that a city is well within its legitimate police powers in enacting reasonable ordinances to protect children in its public streets and highways from viewing 'bare buttocks or bare female breasts, or striptease, burlesque or nudist-type scenes which constitute the main or primary material.'"

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5. Facially, the Grand Prairie ordinance was not as obnoxious to the First Amendment as Jacksonville's, since it was aimed, seemingly, at "nudie" movies, i.e., those in which nudism and sexuality were the "main or primary material" -- an attempt, at least, to do obeisance to *Roth*.

Starting from that premise, he concluded that *Chemline* was not positioned to contest constitutionality of the ordinance since it "admitted that the pictures were not suitable for viewing by children and undertook not to admit children" -- all of which made it "not unreasonable for the City to require that . . . such adult films for profit" should not be screened "on premises . . . accessible to the view of children."

So, in the end, Judge Rives relied, wholly, on dictum from Mr. Justice Brennan's opinion in *Jacobellis v. State,* 378 U.S. 184; 12 L.Ed.2d 793; 84 S.Ct. 1676, 1682 (1964) -- declaring:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population . . . to reading only what is fit for children.' *Butler v. Michigan,* 352 U.S. 380, 383 [77 S.Ct. 524, 526, 1 L.Ed.2d 412]. State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination. Since the present conviction is based upon exhibition of the film to the public at large and not upon its exhibition to children, the judgment must be reviewed under the strict standard applicable in determining the scope of the expression that is protected by the Constitution." *Chemline, Inc. v. City of Grand Prairie,* 364 F.2d 721, p. 725, 726.

Thus, Judge Rives opined the District Court had erred in confining "its consideration" to the "harmful effects of such

pictures . . . on the average person."

"Separate consideration" should have been given to the "harmful effects on children" -- and, indeed, "it was not proper thus to ignore the special interests of children."

Chemline, accordingly, has no precedential value, at all, in Erznoznik's cause -- because, as seen, its axis was that "It is almost self-evident . . . a city is well within its legitimate police powers in enacting reasonable ordinances to protect children in its public streets . . . from viewing bare buttocks . . . ," etc.

Judge Rives' reliance on *Jacobellis*, then, to give constitutional blessing to the Grand Prairie Ordinance, was misplaced, to say the least -- in that he ignored its express admonition that an anti-obscenity law applicable to the "public at large" may not be used as a vehicle to convict an accused of disseminating harmful matter to children -- except upon carrying the heavy burden articulated in *Roth*.

And Judge Rives made no specific mention of *Butler v. Michigan*, 352 U.S. 380, in which Mr. Justice Frankfurter, speaking for a unanimous Court -- a rare phenomenon in obscenity cases -- voided Butler's conviction "for selling to a police officer" a book -- deemed by a Michigan State Court judge "obscene, immoral, lewd or lascivious . . . (and) tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth."

The Frankfurtian view was:

That Butler was convicted of selling to an adult "a book that the trial judge found to have a potentially deleterious influence upon youth."

That in "exercising its police power" to ban books "in order to shield juvenile innocence" -- a State may not enlarge the quarantine to include "the general reading public";

That, accordingly, the statute in controversy was unconstitutional because "not reasonably restricted to the evil with which it is said to deal."

What is obvious, therefore, is that even in the state of First Amendment law then existing -- i.e., 1966 -- *Chemline* was unsupportable -- could not have been decided as it was had the teachings of *Jacobellis* and *Butler* been heeded -- and, in all probability, would have been reversed, summarily, on certiorari -- but no application was made.

Later cases dramatize even more Chemline's frailty.[6]

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6. For instance, in *Interstate Circuit v. Dallas*, 390 U.S. 676, 20 L.Ed.2d 225, 88 S.Ct. 1298 (1968), the Supreme Court reviewed an Ordinance creating a "Motion Picture Classification Board" to classify films as "suitable for young persons" or "not suitable for young persons."

Mr. Justice Marshall -- for the majority -- acknowledged that the State "may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults."

But even legislation "adopted for the salutary purpose of protecting children" is not exempt from the due process condemnation of the vice of vagueness:

> "Vagueness and the attendant evils we have earlier described, . . . are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression. Cf. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 9 L.Ed.2d 584, 83 S.Ct. 631 (1963). Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutory purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children. As Chief Judge Ful has said:
>
> > 'It is . . . essential that legislation aimed at protecting children from allegedly harmful expression -- no less than legislation enacted with respect to adults -- be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application,' *People v. Kahan*, 15 NY2d 311, 313, 206 N.E.2d 333, 335 (1965) (concurring opinion)."

Judge Rives" Change of Mind:

Moreover, by 1969, Judge Rives, obviously, had changed his mind about the constitutional immaculateness of Chemline-like legislation, when he wrote the opinion in ***Entertainment Ventures v. Brewer,*** 306 F.Supp. 803 for a three-judge court -- Rives, Johnson and Pittman -- nullifying a statute, invoked as a basis for prosecuting motion picture operators in a state court -- providing:

> *"Nude pictures, display of prohibited.*— Any person, firm or corporation who shall display nude pictures of a man, woman, or girl in any public place, except art galleries, shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than fifty dollars nor more than five hundred dollars."

CINECOM PRONOUNCEMENT:

Ignored by the First District of Florida and Florida's Supreme Court, *Cinecom Theatres Midwest States, Inc. v. City of Fort Wayne,* 473 F.2d 1297 (7th Cir., 1973), however, is precisely in point -- holding an ordinance -- reading almost word for word like the one in contest here -- unconstitutional.

The City of Fort Wayne, Indiana, enacted an ordinance which -- inter alia -- made it unlawful for drive-in theatres to exhibit films in which "bare buttocks or the bare female breasts are shown" visible from any public street or highway.

Cinecom Theatres -- owner and operator of two drive-ins in Fort Wayne sued in a State Court seeking declaratory and injunctive relief.

The action was removed to The Federal District Court which granted relief -- on the ground of vagueness -- as to

that part of the ordinance prohibiting showing of films in which "strip-tease, burlesque or nudist-type scenes constitute the main or primary material."

But that part proscribing display of "bare buttocks," et cetera, was upheld -- the District Court "relying principally on the authority of *Chemline, Inc. vs. City of Grand Prairie*, 364 F. 2nd 721 (5th Cir., 1966) and *Redrup vs. New York*, 386 U. S. 767, 87 Sup. Ct. 1414, 18 L. Ed. 2d 515 (1967) -- and adopting "the City's contentions" -- that protection of children and assault on privacy -- were societal values outweighing *Cinecom's* First Amendment interests.

The Seventh Circuit reversed, saying:

That "a state or city because of its abiding interest in its youth is not without authority to limit access to minors of material which would be objectional as to them, but which would not be obscene in its appeal to adults -- as recognized in *Ginsberg vs. New York*, 390 U. S. 629, 88 Sup. Ct. 1274, 20 L. Ed. 2d 195 (1968) -- which approved the "variable obscenity" doctrine;

That, however, the ordinance, -- in litigation -- was "not an obscenity case in the typical sense" in that "the material proscribed would not be obscene even under an application of the concept of variable obscenity" -- which "connotes some sort of erotic or sexual obscenity";

That the ordinance would outlaw "any exhibition of the described nudity, regardless of context";

That thus the question is broader than passed upon by the Supreme Court in *Ginsberg* -- involving "the extent to which a city may -- go beyond the restrictions implicit in the concept of variable obscenity" -- in seeking to protect youth;

That the only case in point was the Fifth Circuit's decision in *Interstate Circuit vs. City of Dallas*, 366 Fed. 2d 590 (1966) -- relating to classification of motion pictures as "suitable or unsuitable for children under sixteen years of age";

That there the Fifth Circuit said that "while we recognize the interest of society in protecting children, we find even the child's freedom of speech too precious to be subjected to the whim of the censor";

That the Fifth Circuit was right, then, "although a city possesses the authority to regulate this industry for the protection of children -- the ordinance here is much broader than the permissible objective and therefore runs afoul of the First and Fourteenth Amendments";

That *Chemline*, was no longer viable:

> "Although a city possesses the authority to regulate this industry for the protection of its children from exposure to material obscene as to them, the ordinance here is much broader than that permissible objective and therefore runs afoul of the First and Fourteenth Amendments to the Constitution. In reaching this conclusion, we are not persuaded by the Fifth Circuit Court's decision in *Chemline, Inc. vs. City of Grand Prairie*, 364 F. 2d 721 (1966), a decision upon which the district court expressly relied. *Chemline* upheld the constitutionality of an ordinance very similar to the one enacted by the City of Fort Wayne. Aside from the substantial factual distinctions between Chemline and the present case, the legal considerations which have influenced our decision were neither advanced nor considered in Chemline. Moreover, *Interstate Circuit, Inc.* was decided subsequent to the decision in Chem-

line. For similar reasons, we choose not to be guided by the citations relied upon by the City." 473 F. 2d 1297, 1302.

That neither did intrusion upon privacy justify the ordinance, particularly in view of the *Cohen vs. California* decision: [403 U.S. 15, 91 Sup. Ct. 1780, 29 L.Ed.2d 284 (1971]

"We turn now to the second justification advanced here by the City in support of its ordinance. As an independent basis for sustaining the same portion of the ordinance, the district court found that the exhibition of this matter on a drive-in theatre screen amounted to "an assault upon individual privacy . . . in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Redrup vs. New York*, 386 U.S. 767, 769, 89 Sup. Ct. 1414, 1415, 18 L.Ed.2d 515 (1967). Although much is made of the interference that these scenes impose upon neighbors in the peaceful enjoyment of their homes, the ordinance itself proscribes the showing of material only if it can be seen from a public street or highway. There is no mention of individual privacy or the sanctuary of the home in the ordinance."

* * *

"The record here falls short of such a showing. Passing motorists were able to see the screen for only a short moment. The disruption of traffic or traffic accidents were simply not problems. Nor was there any evidence to indicate that the visual presentations were so obnoxious to those walking in the area so as to preclude their avoidance simply by averting the eyes. See *Cohen v. California*, 403 U.S. 15, 21, 91 Sup.Ct. 1780, 29 L. Ed.2d 284 (1971). Having elected to permit the

operation of drive-in movie theaters in this area, some unwitting exposure to these and other types of scenes was inevitable. Since the ordinance applied to exhibitions visible in public areas, and since there was no showing that the visual presentations were so "obtrusive" as to preclude their avoidance, we conclude that the ordinance exceeded the authority of the City to legislate for the protection of recognizable privacy interests. Cf. *Cohen v. California*, 403 U.S. 15, 91, Sup. Ct. 1780, 29 L.Ed.2d 284 (1971)." 473 F 2d 1302-03.

Jacksonville Ordinance Arbitrary:

Assuming, arguendo, that public nuisance legislation, theoretically, could be framed to outlaw non-obscene speech without impingement on the First Amendment[7] -- nonetheless, Jacksonville's Ordinance is not saved -- because it is arbitrary and unreasonable in seeking to make even distant, evenescent glimpses of bare buttocks or breasts or pubic areas -- from public places or streets -- a criminal public nuisance, per se.

Courts are never foreclosed from inquiring into the legislative findings as nuisances of things that are not so in fact, particularly where municipal ordinances and regulations are in issue.

The thrust of the judicial inquiry is to determine whether the act or condition sought to be condemned, legislatively,

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7. See the Special Concurring Opinion of Chief Justice Burger in *Rabe v. Washington*, 405 U.S. 313, 31 L.Ed.2d 258, 92 S.Ct. 993 (1972). But not even the Chief Justice and Justice Rehnquist -- who appear *inclined* to sanction public nuisances as part of the statutory weaponry against scenes of "explicit sexuality" shown at drive-in movies -- would approve Jacksonville's Ordinance aimed at mere flashes of bare anatomical parts, innocent of explicitness, otherwise.

tends to injure the health or to corrupt the manners and morals of the community.

The bounds of rationality are overrun by an assertion that the mere publicly-visible display of "bare buttocks . . . breasts . . . and pubic areas" – on a drive-in theatre screen -- is "manifestly injurious to the manners and morals" of Jacksonvillians.

For instance, in *Delta Book Distributors, Inc., v. Cronvich*, 304 F.Supp. 662 (1969), a three-judge court -- Wisdom, Boyle and Rubin -- condemned a section of Louisiana's obscenity statute criminalizing "display of nude pictures of a man, woman, boy or girl in any public place, except as works of art in art galleries.'

The Court said:

> "Subsection '(7)' of Paragraph A is unconstitutional on its face as plaintiffs contend. A simple reading of this subsection reveals that by its terms it is overbroad. A literal application thereof would, for example, make it a criminal offense to display, for any purposes, universally accepted anatomical works or recognized works of art or the like anywhere but 'in art galleries.' Such a limitation is patently unconstitutional." *Delta Book Distributors, Inc. v. Cronvich*, 304 F.Supp. 662, at 669.[8]

And the Fourth Circuit -- en banc -- summarily reversed -- in a one-paragraph, per curiam opinion -- a finding of obscenity predicated on "the government's position . . . that . . . photographs of nudes . . . (are) obscene, if . . . the pubic

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8. The Supreme Court vacated the judgment but instructed that another -- to the same effect -- be entered for appeal, if Louisiana desired, to the Fifth Circuit. Louisiana did not elect to do so. *Perez v. Ledesma*, 401 U.S. 82, 27 L.Ed.2d 701, 91 S.Ct. 674 (1971)

area of the model is exposed." *U.S. v. Central Magazines,* 381 F.2d 821 (1967).

And a District Court, in Maryland, refused to approve forfeiture of imported magazines -- which the government urged were obscene -- in that they featured "photographs of nude women . . . (with focus . . . on . . . (their breasts or pubic area . . ." etc. *U.S. v. A Shipment of 25,000 Magazines entitled "Revue,"* 254 F.Supp. 1014 (1966).

And the First Circuit has held, flatly, that "No photograph of the female anatomy, no matter how posed, if no sexual activity is being engaged in, or however lacking in social value, can be held obscene." *Hunt v. Kirialeos,* 428 F.2d 606 (1970).

Jacksonville's Ordinance is, facially, arbitrary and unreasonable and cannot be construed to be constitutional.

Privacy Intrusion:

The City will argue that its Ordinance is reasonable exercise of police power to protect intrusion upon privacy.

Cohen v. California, 403 U.S. 15, 29 L.Ed.2d 284, 91 S.Ct. 1780, forecloses the argument.

There cannot be a place more public than a county courthouse[9] -- nor any visible expression more vulgar, offensive

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9. It seems ironic that in 1957, prior to the opening of the new Duval County Courthouse, where the Erznoznik Final Judgment was entered, there was installed (See page 32) and is still maintained (See page 33) two figures forming a massive mural, dominating the entire lobby, depicting the balance between "Law and Liberty." "Law" is represented by a nine-foot bronze figure of a man carrying a scroll, and "Liberty" is a torch-bearing bronze woman nearly as tall. Liberty's "bare female breasts" cannot be ignored by the thousands who of necessity come to the courthouse daily. Such "visual material depicting nudity" would be a clear violation of the Ordinance considered in the case of *Siegel v. Salisbury,* 379 F.Supp. 317, 325 (W.D.Pa., 1974), but an impermissible result.

and infuriating than "Fuck the Draft" -- yet such an expression -- worn on a jacket by a war protester in a courthouse corridor -- is mantled by the First Amendment, wrote Mr. Justice Harlan, for the majority, in *Cohen* -- despite California's insistence that "unwilling" and "unsuspecting . . . viewers" -- including women and children -- were horrified, and aggrieved.[10]

Reason and Principle:

Lest this court find unconvincing the authority of cases cited earlier herein (which, clearly, seem to invalidate the subject Ordinance) both reason and principle, *apart from authority*, support Appellant's position.[11]

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10. It is likewise ironic that Jacksonville's city fathers find fleeting glimpses of nudity a public nuisance when seen from a distance on an outdoor movie screen, without sound effects, at a time when the Supreme Court of the State of New York is finding that "sun bathing in the nude on a public beach along with several other persons" cannot be criminalized without "a showing of lewd conduct" where there was no evidence establishing that the defendant "had intentionally exposed her private parts in a public place in a 'lewd manner' or otherwise committed a 'lewd act' . . .". *People v. Hardey*, 357 N.Y.S2d 970 (S.Ct., App. Term, 9th and 10th Jud. Dist, 1974)

11. Having presented the "law," to the best of the writer's ability, resort is now taken to the advice of the textwriter who suggests:

"Argue reason and principles. The first and most important factor for counsel to remember is that he is writing for a *supreme* court whose decisions are not reviewable by any higher tribunal. The necessary consequence is that the Court is not bound by authorities to any greater extent than it wishes to be, and that the Court is much freer to reach what it regards as the correct or wise decision than any subordinate tribunal. This means that, although, of course, prior authority is not to be ignored, counsel should place great stress on convincing the Court on grounds of reason and principle, apart from authority. For very few cases which reach the Supreme Court are completely indistinguishable from prior decisions, and the Court has great facility in distinguishing cases it does not wish to follow. Arguments which insist that the Court must reach a result because of decisions in other cases, without any other persuasive reason, are not likely to fare very well. Past authority alone can be relied on with confidence only when the prior decision is that of a majority of the presently sitting Justices in an identical situation -- and few cases of that nature reach the Court." See Stern and Gressman, "Supreme Court Practice," (Fourth Edition), pages 472-473.

The Ordinance is facially arbitrary, unreasonable and intolerable.

What does it condemn? Mere nudity! One bare glimpse and you're out, if it happens to be the right spot on the right human. Sex-education films prepared for teenagers would not pass muster in an outdoor theatre.

How does it do so? By making the test, whether what is seen is in fact seen from a "public street or public place." If there be a "knot-hole" gang on the theatre property which does not border a public street or public place, or boys sitting in a tree, on private property, no law is violated. Likewise, what may be seen from a backyard of a private residence is not objectionable.

Who does it criminalize? Every employee "connected with or employed by any drive-in theatre" which exhibits any picture containing any of the described scenes. Certainly all employees required to operate the theatre "assist" the showing of every film shown; so, the Ordinance, if valid, puts all employees between the proverbial "rock and a hard place" for they must insist on previewing their employer's films, risk criminal prosecution, or hunt for another job.

Who does it purport to protect? No identified or identifiable person or class! It does not, by its terms, purport to express special concern for children, adults or motorists and other travelers on the public streets or otherwise in a public place.

How could it be construed to "protect" children? How do you "protect" children by such an ordinance? By jailing the father of Erznoznik's children? By forcing him out of work? By shielding those children on a "public street or public place"

from a view of forbidden areas of the human body while permitting the same view when seen from private property? Are children "protected" when deprived of what they might see on an outdoor movie screen even though they see the same or similar scenes on newsstands, at home, on the beaches, at indoor theatres or, perhaps, in boy-girl relationships of their own "arrangement"?

Assuming, arguendo, that the subject Ordinance was intended to shield young people from free viewing of what is shown on an outdoor movie screen, and assuming, arguendo, that children viewed the forbidden scenes, how can such be a nuisance -- or corrupt the manners and morals of the community?

Lawyers, juries and judges are not supposed to take leave of their common sense, every day experience in their respective roles and it seems evident that the trial judge laid too much stress on at least one immaterial fact in his Final Judgment; that is, his observation that ". . . the court takes notice of the fact that children as well as adults make up the public."

Most parents, today, if they are honest, will confess that they do not know what parental practices, guide-lines, standards or teachings produce in a child the best response or most responsible behavior. This is particularly true when it comes to sex and sex-education.

Experience has shown that by the time most parents are ready to tell their child about the "birds and bees," the child can tell the parents all about the subject in clear, plain and unambiguous language.

Rightly or wrongly, the human body is no longer the mys-

tery it once was and neither Madison Avenue nor fashion designers fail to exploit its "natural" beauty. Our youth-sex dominated culture may be a blessing or a curse in an overpopulated world but one thing is sure: our survival is more dependent on an open-controlled attitude toward the human body than a "hush-hush," "head-in-the-sand" approach to the age-old problem of "what to tell my child."

The point is that what one may see of the bare human body, *in a non-obscene movie* on an outdoor movie screen, has no bearing on the manners and morals of a community, as a plain, common sense fact.[12]

Some may call such "fact" undersirable "permissiveness" but the unwanted pregnancies that abound today are no respecter of parental philosophy. Nor can it be truthfully said that non-obscene movies incite passions that would otherwise lie dormant when the bare body can barely be seen from a "public road or public place."[13]

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12. Those of us who grew up on the farm or in a small town can testify that neither our manners or morals were corrupted by a wide variety of exposure to sex, from sneaking a look in "hoochie-koochie" shows to various forms of "forbidden" reading materials and experimentation. So where do we get the idea that children must be so carefully shielded from every sensual wind that blows?

13. The Report of the Commission on Obscenity and Pornography, released to the press September 30, 1970 (Bantam Books), in dealing with young persons and the effects of "sexually explicit" materials on children, had this comment: "The Commission recognizes that legislation cannot possibly isolate children from such materials entirely; it also recognizes that exposure of children to sexual materials may not only do no harm but may, in certain instances, actually facilitate much needed communication between parent and child over sexual matters. The Commission is aware, as well, of the considerable danger of creating an unnatura attraction or an enhanced interest in certain materials by making them 'forbidden fruit' for young persons. The Commission believes, however, that these considerations can and should be weighed by individual parents in determining their attitudes toward the exposure of their children to sexual materials, and that legislation should aid, rather than undermine, such parental choice." P. 63.

Therefore, it is reasonable to assume that *no harm* can result to

(Continued on next page)

One thing mini-skirts, no-bras and the new "string" bikini have taught the male population, at least, is that one cannot touch all one can see -- and that the mind of the "displayor" is not necessarily in the same channel as that of the "displayee."

The "Erznozniks" of Duval County should not be convicted and jailed because someone *in a public place* can see all or part of a non-obscene movie having some scenes in which the "bare buttocks . . . female bare breasts . . . or . . . bare pubic areas . . ." are shown.

Perhaps "Liberty" is a bare-breasted woman, as the artist portrays her in the main lobby of the Duval County Courthouse (See pages 32 and 33 hereof). If so, who can honestly defend the City Council's denial of First Amendment protected speech symbolic of that liberty and freedom in a country that staked its future and survival on those concepts?

(Continued from Page 29)
children who may see fleeting-distant-glimpses of such nudity as may occur during the projection of a non-obscene movie on an outdoor movie screen.

CONCLUSION

The Fifth Circuit *Chemline* opinion should be overruled or distinguished, the Ordinance declared unconstitutional and cause remanded to the District Court of Appeal, First District of Florida, for further proceedings consistent with this court's opinion.

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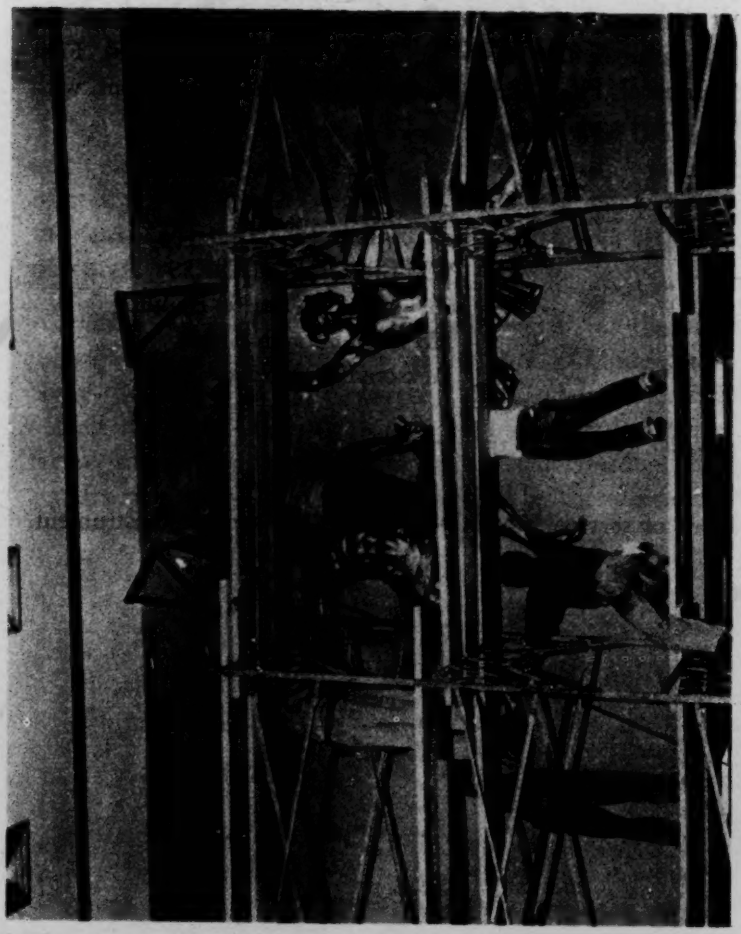
Jacksonville, Florida 32202

Dated: November 15, 1974.

Proof of service November 15, 1974 by separate instrument.



Law and Liberty Installed

Law and Liberty